IN THE COURT OF APPEALS OF THE STATE OF WASHINGTON
DIVISION II

STATE OF WASHINGTON,	)	**No. 37845-1-II**
Respondent,	)	
	)	**UNPUBLISHED OPINION**
v.	)	
	)	
JEREMY GENE DUNN,	)	
	)	
Appellant.	)	
	)	

Brown, J. ─ Jeremy G. Dunn appeals his convictions for illegally possessing methamphetamine, driving without a license and no valid identification, and bail jumping. Mr. Dunn contends his trial counsel was ineffective for failing to ask the court to compare certain of his Oregon crimes to Washington crimes before determining his offender score and standard range sentence. Pro se, Mr. Dunn raises additional review grounds of jury misconduct and cumulative error. Because our analysis concludes that asking for a comparability analysis would not have improved Mr. Dunn's offender score position, Mr. Dunn cannot establish his ineffective assistance claim. We

also reject Mr. Dunn's additional grounds for review. Accordingly, we affirm.

FACTS

The jury found Mr. Dunn guilty as charged of possession of methamphetamine, driving without a license and without valid identification, and bail jumping. Mr. Dunn's criminal history lists 10 prior Oregon convictions, including three first degree theft convictions and three attempts to elude a police officer.

At the sentencing hearing, defense counsel stated, "Okay. I think the State -- the State and I agree that he has a prior offender score of 8, so with the two new felonies he would have an offender score of 9 for sentencing purposes." Report of Proceedings (RP) (June 4, 2008) at 214. The court then asked Mr. Dunn if he acknowledged that his offender score was "9 or more points for purposes of sentencing?" RP (June 4, 2008) at 216. Mr. Dunn answered, "Yes, ma'am." RP (June 4, 2008) at 216. The court did not compare the Oregon convictions to Washington crimes. Based on an offender score of nine, the court sentenced Mr. Dunn to 60 months for bail jumping, concurrent with his possession count. Mr. Dunn appeals.

ANALYSIS

A. Assistance of Counsel

The issue is whether Mr. Dunn was denied effective assistance of counsel based on his counsel's acquiescence to Mr. Dunn's offender score without seeking a

comparative analysis to Washington law for certain of his Oregon convictions.

To succeed in an ineffective assistance of counsel claim, Mr. Dunn must prove his counsel's performance was deficient and, that deficiency prejudiced him. *State v. McNeal,* 145 Wn.2d 352, 362, 37 P.3d 280 (2002); *Strickland v. Washington,* 466 U.S. 668, 687, 104 S. Ct. 2052, 80 L. Ed. 2d 674 (1984). Deficient performance is established by proof that defense counsel's representation "fell below an objective standard of reasonableness based on consideration of all the circumstances." *State v. McFarland,* 127 Wn.2d 322, 334-35, 899 P.2d 1251 (1995). To establish the second prong of the test, the appellant must show that he was affirmatively prejudiced by the deficient performance such that, but for counsel's errors, the result of the proceeding would have been different. *Strickland,* 466 U.S. at 693-94.

Under the Sentencing Reform Act of 1981, a defendant's offender score establishes his standard range sentence. RCW 9.94A.712(3); RCW 9.94A.530. We review de novo a court's offender score calculation. *State v. Bergstrom,* 162 Wn.2d 87, 92, 169 P.3d 816 (2007). RCW 9.94A.525(3) provides, "[o]ut-of-state convictions for offenses shall be classified according to the comparable offense definitions and sentences provided by Washington law." The goal is to ensure that defendants with prior convictions are treated similarly, regardless of where the prior convictions occurred. *State v. Morley,* 134 Wn.2d 588, 602, 952 P.2d 167 (1998).

The State bears the burden of proving both the existence and the comparability

of a prior out-of-state convictions. *State v. Ford,* 137 Wn.2d 472, 480, 973 P.2d 452 (1999). Our Supreme Court has adopted a two-part test for determining crime comparability. First, a sentencing court compares the legal elements of the out-of-state crime with the comparable Washington crime. *Morley,* 134 Wn.2d at 605-06. If the crimes are so comparable, the court counts the defendant's out-of-state conviction as an equivalent Washington conviction. *Id.* at 606. Next, if the elements of the out-of-state crime are different, then the court examines the undisputed facts from the record of the foreign conviction to determine whether that conviction was for conduct that would satisfy the elements of the comparable Washington crime. *Id.*

Two of Mr. Dunn's Oregon first degree theft convictions involve firearm thefts. Oregon defines theft as, "with intent to deprive another of property or to appropriate property to the person or to a third person, the person: (1) Takes, appropriates, obtains or withholds such property from an owner thereof." ORS 164.015(1). Washington defines theft as, "[t]o wrongfully obtain or exert unauthorized control over the property or services of another or the value thereof, with intent to deprive him or her of such property or services." RCW 9A.56.020(1)(a).

In Washington, a person commits theft of a firearm if that person "commits a theft of any firearm." RCW 9A.56.300(1). "Theft of a firearm is a class B felony." RCW 9A.56.300(6). Washington defines a firearm as "a weapon or device from which a projectile or projectiles may be fired by an explosive such as gunpowder." RCW

9.41.010(1). Likewise, Oregon defines a firearm as "a weapon, by whatever name known, which is designed to expel a projectile by the action of black powder or smokeless powder and which is readily capable of use as a weapon." ORS 164.055(2)(c).

The first set of Oregon first degree theft offenses is comparable because it, like the compared Washington offense, entails intent to deprive another of property (i.e., a firearm). Thus, the court properly included these offenses (counted as 1 point based on same criminal conduct analysis) in Mr. Dunn's offender score. Mr. Dunn's other Oregon first degree theft conviction stems from the theft of a mountain bike, cellular phone, and purse with a total property value of $1,000.00 or more. A person commits first degree theft in Oregon for the theft of property valued at $750.00 or more. ORS 164.055(1)(a). In Washington, the crime is elevated to first degree theft if the property value is over $1,500.00. RCW 9A.56.030(1)(a). While the Oregon indictment does not specify the exact value of the stolen property, it is clearly a felony and would count as another point on Mr. Dunn's offender score. RCW 9.94A.525(7).

Turning to Mr. Dunn's three Oregon attempt to elude a police officer convictions, in Oregon a person commits this crime if "(a) The person is operating a motor vehicle; and (b) A police officer who is in uniform and . . . operating a vehicle appropriately marked . . . gives a visual or audible signal to bring the vehicle to a stop . . . and [t]he person, while still in the vehicle, knowingly flees or attempts to elude a pursuing

police." ORS 811.540(1)(a); (b)(A). Washington, however, adds the element of reckless driving. *See* RCW 46.61.024(1) ("Any driver of a motor vehicle who willfully fails or refuses to immediately bring his vehicle to a stop and who drives his vehicle in a reckless manner while attempting to elude a pursuing police vehicle . . . shall be guilty of a class C felony.").

Significantly, Mr. Dunn was charged with reckless driving in each of his Oregon attempt to elude convictions.[1] Since the elements of both crimes are not identical, we must examine the facts of the offense to determine whether Mr. Dunn's conduct would have violated the comparable Washington statute. *Morley,* 134 Wn.2d at 605-06. The additional reckless driving convictions in Oregon satisfy the extra element in Washington's attempt to elude statute. Hence, at least two of the Oregon attempts to elude convictions are comparable. The inclusion of the attempt to elude conviction that did not include a reckless driving conviction (because it was later dismissed) would not be prejudicial since Mr. Dunn agreed his offender score was at a "9 or more." RP at 216.

In *State v. Thiefault*, 160 Wn.2d 409, 158 P.3d 580 (2007), the Court found defense counsel's performance deficient when counsel mistakenly failed to object to the sentencing court's incorrect conclusion that the defendant's prior conviction from Montana was legally comparable. The *Thiefault* court held counsel's failure to hold the State to its burden of proving comparability before it waived any objections to the

[1] One count of reckless driving was later dismissed.

inclusion of the prior out-of-state conviction was prejudicial. *Id.* at 414-16.

But unlike *Thiefault,* Mr. Dunn fails to show the crimes are not comparable, so he cannot establish deficient performance or that his sentence would have been any different if his counsel had objected to including his Oregon convictions. Accordingly,

Mr. Dunn fails to establish ineffective assistance of counsel during sentencing.

B. Additional Grounds for Review

In his statement of additional grounds for review, Mr. Dunn contends he was denied his right to an impartial jury and cumulative error denied him a fair trial.

Under the Sixth Amendment to the United States Constitution and article I, section 22 of the Washington State Constitution, "'a defendant is guaranteed the right to a fair and impartial jury.'" *State v. Roberts,* 142 Wn.2d 471, 517, 14 P.3d 713 (2000) (quoting *State v. Brett,* 126 Wn.2d 136, 157, 892 P.2d 29 (1995)). Mr. Dunn argues Juror No. 10 was not impartial because of his frustrations with the judicial system.

Before trial, the court received a note from a juror that Juror No. 10 made comments prior to being seated that inferred he was "soured" on the judicial system. RP at 14. These same sentiments were reflected earlier during jury questioning. When questioned again, Juror No. 10 assured the parties he could be objective and hear the law and apply the law to the facts. Based on Juror No. 10's assurances, Mr. Dunn cannot show he was denied a fair and impartial jury.

Turning to cumulative error, the doctrine applies if there are "several trial errors that standing alone may not be sufficient to justify reversal but when combined may deny a defendant a fair trial." *State v. Greiff,* 141 Wn.2d 910, 929, 10 P.3d 390 (2000). But, when no prejudicial error is shown, as here, the cumulative error doctrine does not apply. *State v. Stevens,* 58 Wn. App. 478, 498, 794 P.2d 38 (1990).

Affirmed.

A majority of the panel has determined this opinion will not be printed in the Washington Appellate Reports, but it will be filed for public record pursuant to RCW 2.06.040.

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Brown, J.

WE CONCUR:

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Van Deren, J.

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Penoyar, J.